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IN THE
COURT OF APPEALS OF INDIANA

SEASONAL HEATING & AIR CONDITIONING, INC.,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 64A03-0610-CV-466
STANLEY F. TAYLOR, BRIAN C. HENDRIX, and PORTAGE HEATING & COOLING, L.L.C.,	)	
Appellees-Defendants.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Mary R. Harper, Judge
Cause No. 64D05-0606-PL-5354

June 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Seasonal Heating & Air Conditioning, Inc., ("Seasonal") appeals the trial court's denial of its motion for preliminary injunction against Stanley F. Taylor, Brian C. Hendrix, and Portage Heating & Cooling, LLC ("PHC"). Seasonal raises four issues, which we consolidate and restate as:

I. Whether the trial court's finding that Seasonal failed to prove a reasonable likelihood of success at trial is clearly erroneous; and

II. Whether the trial court's finding that Seasonal failed to prove that its remedy at law was inadequate is clearly erroneous.

Because we find Issue I dispositive, we do not address Issue II. We affirm.

The relevant facts follow. Seasonal is in the business of designing, selling, installing, and servicing heating and air conditioning systems and refrigeration systems and selling parts relating to heating, air conditioning, and refrigeration equipment. Seasonal is located in Portage, Indiana.

Hendrix was employed at Seasonal from April 1988, until June 2006. Taylor was employed at Seasonal from December 1996, until May 12, 2006. Both Hendrix and Taylor worked as heating, ventilation, and air conditioning ("HVAC") installers, but they were not involved in the selling or leasing aspects of Seasonal's business. Additionally, both Hendrix and Taylor signed an Employee Agreement that provided, in part:

* * * * *

> 7. CONFIDENTIALITY. Employee recognizes that Employer has and will have the following information:
> - inventions
> - machinery
> -products
> -prices

-apparatus
-costs
-discounts
-future plans
-business affairs
- process information
-trade secrets
-technical information
-customer lists
-product design information

and other vital information (collectively, “Information”) which are valuable, special and unique assets of Employer. Employee agrees that the Employee will not at any time or in any manner, either directly or indirectly, divulge, disclose, or communicate in any manner any Information to any third party without the prior written consent of the Employer. Employee will protect the Information and treat it as strictly confidential. A violation by Employee of this paragraph shall be a material violation of this Agreement and will justify legal and/or equitable relief.

* * * * *

10. NON-COMPETE AGREEMENT. Recognizing that the various items of Information are special and unique assets of the company, Employee agrees and covenants that for a period of two years following the termination of this Agreement, whether such termination is voluntary or involuntary, Employee will not directly or indirectly engage in any business competitive with Employer. This covenant shall apply to the geographical area that includes the area within a 30 mile radius of PORTAGE, IN[.]

Directly or indirectly engaging in any competitive business includes, but is not limited to, (i) engaging in a business as owner, partner, or agent, (ii) becoming an employee of any third party that is engaged in such business, (iii) becoming interested directly or indirectly in any such business, or (iv) soliciting any customer of Employer for the benefit of a third party that is engaged in such business.

* * * * *

Appellant’s Appendix at 214-215, 220-221.

Taylor voluntarily left Seasonal's employment in May 2006, and Hendrix voluntarily left Seasonal's employment in June 2006. Hendrix and Taylor formed PHC, a business engaged in installing HVAC units for new construction with minimal service work on the units they install.

On June 21, 2006, Seasonal filed a complaint for preliminary and permanent injunctions against Hendrix, Taylor, and PHC. After a hearing on the preliminary injunction, the trial court entered findings of fact and conclusions thereon as follows:

> Before this court can evaluate whether Seasonal Heating's preliminary injunction request should be granted, this court must determine whether the restrictive covenant contained in the Employment Agreement is reasonable. A covenant "must be reasonable with respect to the legitimate interests of the employer, restrictions on the employee, and the public interest," and the "employer bears the burden of showing that the covenant is reasonable and necessary in light of the circumstances." Pathfinder [Comm. Corp. v. Macy], 795 N.E.2d [1103, 1109 (Ind. Ct. App. 2003)].
>
> To determine whether the employer has a protective interest, courts have suggested examples of such an interest would include good will, including confidential information such as customers' names and addresses, Id. at 1110, and repeat business when the business is generated from a salesman's designated sales territories. Licocci v. Cardinal Associates, Inc., 445 N.E.2d 556, 564 (Ind. 1983). It is unclear whether Seasonal Heating has proved either of these forms of protective interest, because customers' names that are easily attainable, as they could be in the instant case by driving around construction sites, do not fall within the realm of protectible information. See, e.g., Norlund [v. Faust], 675 N.E.2d [1142, 1154 (Ind. Ct. App. 1997)] (stating that a covenant protecting "general practice that could be observed by anyone . . . is not valid"). Additionally, Taylor and Hendrix were merely installers and not salesmen, thus not qualifying under the repeat business exception contained in Licocci. However, because the Defense concedes that Seasonal Heating does have a protectible interest in the repeat business from HVAC installation, at least as to the new construction clients Taylor and Hendrix worked with, this court will so hold and move forward with the analysis. Defendant's Proposed Findings of Fact and Conclusions of Law 9-10.

Next, the court must determine whether the covenant's terms are reasonable regarding time, geography, and types of activity prohibited. Pathfinder, 795 N.E.2d at 1109. The non-Compete clause is extensive in its prohibition as it states that "Employee will not directly or indirectly engage in any business competitive with Employer," which includes involvement as owner, partner, or agent, becoming employed by a third party engaged in such business, or even merely becoming interested directly, or indirectly in any such business that is competitive with Employer. Plaintiff's Exhibits 2-3. Seasonal Heating's non-compete agreement is unreasonable under Indiana law because the covenant goes beyond the employer's legitimate interest of protecting the repeat business from HVAC installation by prohibiting the employee "from working within portions of the business with which the employee was never associated." MacGill [v. Reid], 850 N.E.2d [926, 932 (Ind. Ct. App. 2006)]. See also, Pathfinder, 795 N.E.2d at 1114 (stating that covenant prohibition extending beyond its interest in defendant as on-air personality and preventing defendant from working in any capacity at a radio station listed in overbroad and therefore unreasonable.). Both defendants were employed only as heating, ventilation and air conditioning (HVAC) installers. Testimony of Robert Jaeger. This covenant, however, would prohibit Taylor and Hendrix from performing functions for another company that they never performed for Seasonal Heating, including selling or leasing equipment, or even answering the phone. Thus, the covenant's scope regarding activities prohibited is overbroad and unreasonable and is therefore unenforceable. MacGill, 850 N.E.2d at 932-933.

Furthermore, the geographic restriction is also overly broad and unreasonable. A covenant containing a thirty mile radius prohibition "may be reasonable only in very unusual circumstances, such as where 'trade secrets' are involved." Slisz [v. Munzenreider Corp.], 411 N.E.2d [700, 707 (Ind. Ct. App. 1980)] (finding the covenant with a 30-mile radius restriction unacceptable partly because the former employee utilized no secret of confidential information). A protectible trade secret has four characteristics: information; it derives independent economic value; it is not generally known; and is the subject of attempts to maintain its secrecy. Burk v. Heritage Food Serv. Equip., 737 N.E.2d 803, 813 (Ind. Ct. App. 2000)(finding a trade secret where defendant Rody had unfairly used the company's "marketing information and sales strategy in breach of the trade secrets clause"). There is nothing in the record to indicate a protectible trade secret in the instant case; the only possible unique quality of installation Seasonal Heating can claim is related to the metal binding process for its duct work. However, Seasonal Heating does not mention any trade secret nor has it claimed this particular furnace connection mechanism derives independent economic value or has been kept secret. The Plaintiff merely states that the company "has a legitimate protectible interest in the specific and unique methods of its operation and techniques" without explaining what that interest is. Plaintiff's Proposed Conclusions of Law ¶ 8. Because there is no unusual circumstance such as trade secret to make the thirty mile radius reasonable, the geographic restriction in the Non-Compete Agreement is unreasonable. Slisz, 411 N.E.2d at 707. Even if Seasonal Heating could claim a legitimate protectible trade secret, the geographic restriction would still be unreasonable because it imposes too excessive a restriction on Defendants when an overwhelming majority of Seasonal Heating's customers are located in Lake and Porter counties. Testimony of Stanley Taylor.

Furthermore, Seasonal Heating has not met the standard for a preliminary injunction, in that it has failed to show that a remedy at law is inadequate or that the threatened injury to the company outweighs any potential harm an injunction would inflict upon the Defendants. However, because Seasonal Heating's Employment Agreement is overly broad and therefore unenforceable per MacGill, supra, that issue is dispositive and the requirements for a preliminary injunction need not be analyzed further.

CONCLUSION

Indiana law does not allow a breach of contract claim where the Employment Agreement's Non-Compete Clause is overly broad because that renders the clause unenforceable. The scope of Seasonal Heating's Agreement is unreasonable regarding the activities prohibited because it restricts Taylor and Hendrix from participating in business aspects they were not involved in while employed at Seasonal Heating. Furthermore, the geographic restriction is similarly unreasonable because there is no trade secret alleged to qualify it for unusual circumstances. Additionally, Plaintiff failed to meet its burden of proving by a preponderance of the evidence all requirements for a preliminary injunction. For these reasons under Indiana law, Plaintiff's request for a preliminary injunction is denied.

ORDER

This court now **DENIES** the Plaintiff's Request for Preliminary Injunction. Under Indiana law, this Court finds as follows:

1. The terms of the Non-Compete Agreement contained in Paragraph 10 of the Employment Agreement are unreasonable in activities prohibited because the terms prohibit Defendants from working in areas of a business which they were not involved with at Seasonal Heating, and as such, are unenforceable.
2. The terms of the Non-Compete Agreement contained in Paragraph 10 of the Employment Agreement also include an unreasonable geographic restriction, as it extends well past the locations of the

vast majority of their customers and there is no protectible trade secret alleged to make the distance reasonable.

3. The Plaintiff failed to meet by a preponderance of the evidence the requirements for a preliminary injunction to be granted.

Appellant's Appendix at 285-289.

The grant or denial of a request for a preliminary injunction rests within the sound discretion of the trial court, and our review is limited to whether there was a clear abuse of that discretion. Ind. Family & Soc. Servs. Admin. v. Walgreen Co., 769 N.E.2d 158, 161 (Ind. 2002). When determining whether to grant a preliminary injunction, the trial court is required to make special findings of fact and state its conclusions thereon. Barlow v. Sipes, 744 N.E.2d 1, 5 (Ind. Ct. App. 2001) (citing Ind. Trial Rule 52(A)), trans. denied. When findings and conclusions thereon are made, we must determine if the trial court's findings support the judgment. Id. We will reverse the trial court's judgment only when it is clearly erroneous. Id. Findings of fact are clearly erroneous when the record lacks evidence or reasonable inferences from the evidence to support them. Id. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. CSX Transp., Inc. v. Rabold, 691 N.E.2d 1275, 1277 (Ind. Ct. App. 1998), trans. denied. We consider the evidence only in the light most favorable to the judgment and construe findings together liberally in favor of the judgment. Barlow, 744 N.E.2d at 5. Moreover, "[t]he power to issue a preliminary injunction should be used sparingly, and such relief should not be granted except in rare instances in which the law and facts are clearly within the moving party's favor." Id.

To obtain a preliminary injunction, the moving party has the burden of showing by a preponderance of the evidence that:

> 1) [movant's] remedies at law were inadequate, thus causing irreparable harm pending resolution of the substantive action;
>
> 2) it had at least a reasonable likelihood of success at trial by establishing a prima facie case;
>
> 3) its threatened injury outweighed the potential harm to [nonmovant] resulting from the granting of an injunction; and
>
> 4) the public interest would not be disserved.

Walgreen, 769 N.E.2d at 161. The movant must prove each of these requirements to obtain the preliminary injunction. McGlothen v. Heritage Envtl. Servs., L.L.C., 705 N.E.2d 1069, 1074 (Ind. Ct. App. 1999).

I.

The first issue is whether the trial court's finding that Seasonal failed to prove a reasonable likelihood of success at trial is clearly erroneous. Noncompetition agreements or covenants not to compete are in restraint of trade and are not favored by the law. Burk v. Heritage Food Service Equipment, Inc., 737 N.E.2d 803, 811 (Ind. Ct. App. 2000). Noncompetition agreements are strictly construed against the employer and are enforced only if reasonable. Id. Covenants must be reasonable with respect to the legitimate interests of the employer, restrictions on the employee, and the public interest. Id.

In determining the reasonableness of the covenant, we examine whether the employer has asserted a legitimate interest that may be protected by a covenant. Id. If the employer has asserted a legitimate, protectible interest, then we determine whether the scope of the agreement is reasonable in terms of time, geography, and types of activity prohibited. Id. The employer bears the burden of showing that the covenant is reasonable and necessary in light of the circumstances. Id. The employer must demonstrate, in other words, that "the former employee has gained a unique competitive advantage or ability to harm the employer before such employer is entitled to the protection of a noncompetition covenant." Id. (quoting Slisz v. Munzenreider Corp., 411 N.E.2d 700, 705 (Ind. Ct. App. 1980)).

The trial court did not specifically address Seasonal's reasonable likelihood of success at trial. However, we note that once the party moving for the preliminary injunction demonstrates that there is a protectible interest and that the scope of the non-competition restriction "is reasonable in terms of time, geography, and types of activity prohibited," that party "has established a reasonable likelihood of success at trial." Unger v. FFW Corp., 771 N.E.2d 1240, 1245 (Ind. Ct. App. 2002).

The trial court found that Seasonal had a protectible interest but that the scope of the agreement was unreasonable in terms of geographic restrictions and restrictions of the types of activity prohibited. On appeal, Seasonal argues that the agreement's geographic restrictions and restrictions on the types of activities prohibited were reasonable.[1] We

[1] Seasonal also argues that the trial court erred by finding that Seasonal did not have a protectible interest. The trial court first found it was unclear whether Seasonal proved a protectible interest in customers' names or repeat business. However, the trial court then noted that Hendrix and Taylor conceded that Seasonal had a protectible interest in the repeat business. Thus, the trial court found that Seasonal had a protectible interest. Consequently, we need not address Seasonal's argument that the trial court erred by finding that Seasonal did not have a protectible interest.

first address Seasonal's argument regarding the types of activities prohibited by the agreement.

The agreement at issue provides that "Employee will not directly or indirectly engage in any business competitive with Employer" for two years after the termination of the agreement. Appellant's Appendix at 214, 220.

> Directly or indirectly engaging in any competitive business includes, but is not limited to, (i) engaging in a business as owner, partner, or agent, (ii) becoming an employee of any third party that is engaged in such business, (iii) becoming interested directly or indirectly in any such business, or (iv) soliciting any customer of Employer for the benefit of a third party that is engaged in such business.

Id. at 215, 221. Thus, under the agreement, Hendrix and Taylor would not be allowed to be an employee in any capacity of any business in competition with Seasonal.

We held in Burk, 737 N.E.2d at 812, that such a broad restriction was unreasonable. There, the agreement provided:

> (a) Employee agrees that during the term of employment, and for a period of two (2) years following the termination of Employment for whatever reason by any party thereto, Employee will not, directly or indirectly, do any of the following:
>
> (i) Own, manage, control or participate in the ownership, management or control of, or be employed or engaged by or otherwise affiliated or associated as consultant, independent contractor or otherwise with any corporation, partnership, proprietorship, firm, association or other business entity which competes with, or otherwise engages in any business of the Corporation, as presently conducted in the States [sic] of Indiana (Territory" [sic]).

737 N.E.2d at 812. The employee argued that the covenant was overbroad in that it effectively prohibited the employee from working for a competitor in any capacity. Id.

We agreed, and relying upon Bridgestone/Firestone, Inc. v. Lockhart, 5 F.Supp.2d 667 (S.D. Ind. 1998), held that the restriction was unenforceable. Id.

In support of its argument that the types of activities prohibited by the agreement are reasonable, Seasonal relies upon Unger, 771 N.E.2d at 1245. There, a bank president signed a covenant not to compete, which provided:

> *Competitive Activity*. During the term hereof and for a period of one (1) year after termination of the employment, Employee shall not, in Wabash County, Indiana, or any county adjacent thereto, either on his own behalf or as an employee, agent or representative of another party, person or corporation, be engaged or actively interested directly or indirectly in any business competitive with the business of Employer (as defined below) and he will not directly own, manage, operate, gain control of, finance or otherwise participate in the ownership, management, operation or control of or be employed by or connected in any manner with any business which is competitive with the business of Employer, nor will he directly or indirectly tamper with or induce any employees, agents, or customers of Employer to leave Employer or to stop buying from Employer, or to otherwise abandon Employer; and for a breach of the foregoing covenants, Employer, its successors and assigns, in addition to all other rights and remedies, shall be entitled to injunctive relief. The term "business of Employer" as used herein means and includes business in which Employer or any successor thereto (by merger or otherwise), or any present or future subsidiary or division of Employer is now engaged, and other or additional business in which Employer, and successor thereof, or subsidiaries, may be engaged hereafter as determined by the Board of Directors of Employer.

Id. at 1242. On appeal, the bank president, relying upon Burk, argued that the broad restriction was unenforceable. Another panel of this court distinguished Burk by noting that "[u]nlike in Burk, however, Unger was only prevented from participating in any 'business competitive with the business of Employer' in Wabash County and the six adjacent counties for one year after the termination of employment." Id. at 1245. The panel concluded that the scope of activities prohibited were reasonable and that the agreement was enforceable. Id.

Hendrix and Taylor respond that it is "difficult to reconcile" Burk and Unger but that recent cases have followed Burk. Appellee's Brief at 6; see MacGill v. Reid, 850 N.E.2d 926, 932-933 (Ind. Ct. App. 2006) (holding that a covenant not to compete was unreasonable because the covenant which restricted the employee from owning, managing, or materially participating in any business substantially similar to the employer's business would prevent her from being employed in any capacity by any other cleaning business and was unreasonable because it extended beyond the scope of the employer's good will interest of protecting its current customers and housekeepers); Sharvelle v. Magnante, 836 N.E.2d 432, 438 (Ind. Ct. App. 2005) (holding that a covenant's prohibition on a physician from practicing "health care of every nature and kind" was unreasonable where the physician had been employed to practice in the specialty of ophthalmology); Pathfinder Comm. Corp. v. Macy, 795 N.E.2d 1103, 1114 (Ind. Ct. App. 2003) (holding that a covenant's provision that a radio disc jockey would "not engage in activities" at certain radio stations was overbroad because it would have prevented the employee from being employed in any capacity by any radio station listed in the covenant and "extend[ed] far beyond" the employer's legitimate interest in the employee).

Following Burk's lead, we conclude that Seasonal's covenant not to compete extends far beyond Seasonal's legitimate interests. The covenant not to compete would prevent Taylor and Hendrix from being an employee in any capacity of any business in competition with Seasonal even though Hendrix and Taylor performed only new construction HVAC installations for Seasonal and Seasonal's business included many other aspects, such as designing, selling, installing, and servicing heating and air conditioning systems and refrigeration systems and selling parts relating to heating, air conditioning, and refrigeration equipment. The provision does not take into account the services specifically provided by Taylor or Hendrix to Seasonal. Thus, the provision is unreasonable and unenforceable.

Generally, if we find that portions of the covenant are unreasonable, we "may not create a reasonable restriction under the guise of interpretation, since this would subject the parties to an agreement they have not made." Burk, 737 N.E.2d at 811 (quoting Smart Corp. v. Grider, 650 N.E.2d 80, 83 (Ind. Ct. App. 1995), reh'g denied, trans. denied). However, if a covenant is clearly divisible into parts, and some parts are reasonable while others are unreasonable, we may enforce the reasonable portions only. Id. "Under this process, known as 'blue-penciling,' a court strikes unreasonable provisions from the covenant." Id. "When applying the blue pencil, a court must not add terms that were not originally part of the agreement." Id. Rather, "unreasonable restraints are rendered reasonable by scratching out any offensive clauses to give effect to the parties intentions." Id. (quoting Smart Corp., 650 N.E.2d at 84).

Our review of the provision at issue reveals that we cannot make the provision reasonable without adding terms to limit its application to the HVAC installation portion of Seasonal's business, which we cannot do under the blue-penciling doctrine. We conclude that the provision is not susceptible to blue-penciling and, thus, is unenforceable against Hendrix and Taylor. See, e.g., id. at 812 (holding that a covenant not to compete was unreasonably broad and could not be made reasonable without adding terms).

Because we conclude that the scope of activities prohibited by the covenant not to compete is unreasonably broad and the covenant is, thus, unenforceable, we need not address Seasonal's remaining arguments regarding the scope of the geographic limitations of the provision. Moreover, because the covenant is unenforceable, Seasonal failed to prove a reasonable likelihood of success at trial.

We also note that the trial court found that Seasonal failed to meet its burden of proving "that the threatened injury to the company outweighs any potential harm an injunction would inflict upon the Defendants." Appellant's Appendix at 288. Seasonal did not address this finding in its appellant's brief. Consequently, the trial court's denial of Seasonal's request for a preliminary injunction is also sustainable on this basis. Seasonal failed to prove each element required to obtain a preliminary injunction, and the trial court did not err by denying Seasonal's request for a preliminary injunction.[2]

For the foregoing reasons, we affirm the trial court's denial of Seasonal's request for a preliminary injunction.

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[2] Seasonal also argues that the trial court erred by finding that it failed to prove that its remedy at law was inadequate. Because we conclude that Seasonal failed to prove a reasonable likelihood of success at trial, we need not address that issue.

Affirmed.

CRONE, J. concurs

SULLIVAN, J. concurs in result